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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1586

ROGER L. KEECH and SANDRA J. KEECH,

Petitioners,

—against—

UNITED STATES OF AMERICA and
MORGAN GUARANTY TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Roger L. Keech and Sandra J. Keech (hereinafter "taxpayers") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 6, 1978.

Opinions Below

The opinion of the Court of Appeals, which is not yet officially reported, is reprinted as Appendix A annexed hereto. A copy of the Judgment of the Court of Appeals is annexed hereto as Appendix B. There was no written opinion issued by the United States District Court for the Southern District of New York. Its Order, which was affirmed by the Court of Appeals, is annexed hereto as Appendix C.

Jurisdiction

Enforcement of the District Court's Order was stayed pending the appeal to the Court of Appeals. The judgment of the Court of Appeals was entered on February 6, 1978. The Court of Appeals' opinion provided for a stay of enforcement for fourteen days and for a further automatic stay if within that period an application for a further stay pending a petition for certiorari was filed with the Supreme Court. Petitioners timely filed such an application for a stay with the Hon. Thurgood Marshall, who, on March 10, 1978, ordered that execution and enforcement of the Court of Appeals' judgment be stayed pending the timely filing of a petition for a writ of certiorari and, upon such timely filing, until the Supreme Court's determination of the petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Internal Revenue Service may lawfully issue an administrative summons solely for the purpose of a criminal investigation.

2. Whether the Court of Appeals properly held that the intervening taxpayers did not allege sufficient facts to entitle them to a hearing on their claim that the summons had been issued solely for criminal purposes, where the taxpayers made the same factual showing that has been held adequate to warrant a hearing by the United States Courts of Appeals for the Third and Seventh Circuits.

Statutory Provisions

Title 26, United States Code

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named

in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

§ 7604. Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the

law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Statement of the Case

On June 17, 1977, a special agent of the Internal Revenue Service ("IRS") served an administrative summons upon the Morgan Guaranty Trust Company "in the matter of the tax liability of Roger Keech", demanding testimony and production by the bank of books, records, papers and other data relating to taxpayers-petitioners Roger L. Keech and Sandra J. Keech. Pursuant to 26 U.S.C. § 7609(b)(2), compliance with said summons was stayed by written notice to the bank, sent on June 20, 1977 on behalf of the taxpayers, with a copy of said notice to the special agent who issued the summons.

By order to show cause dated October 6, 1977, the Government petitioned in the United States District Court for the Southern District of New York pursuant to 26 U.S.C. § 7604 for an order directing the bank to testify and produce the various records called for in the summons at issue. The bank took no position on the petition (nor has the bank ever taken any position in either the District Court or the Court of Appeals). The taxpayers intervened* and opposed enforcement of the summons on the ground that it had been issued in bad faith in that it had been issued solely for the improper purpose of a criminal investigation of taxpayer Roger Keech. As an

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* The taxpayers exercised their newly-created statutory right to intervene pursuant to 26 U.S.C. § 7609 (a provision of the Tax Reform Act of 1976). The Government has conceded their statutory right of intervention in the Courts below.

alternative to outright dismissal of the petition, the taxpayers requested that the District Court conduct an evidentiary hearing, with appropriate discovery, to determine whether the summons had been issued solely in aid of a criminal investigation, as the taxpayers claimed, in which event, they contended, enforcement of the summons should be denied. In support of their application for a hearing and/or discovery, the taxpayers submitted affidavits and documents which, they contended, established *prima facie* that the summons had been issued solely in aid of a criminal investigation.

The Government's petition, and the taxpayers' application for a hearing and/or discovery, came on for argument in the District Court on November 18, 1977. After hearing oral argument, the District Court ruled from the Bench and orally granted the Government's petition for enforcement of the summons, and denied the taxpayers' application for an evidentiary hearing and/or discovery with respect to the issue of whether the summons had been issued solely for the improper purpose of criminal investigation. A written Order was filed on the following day embodying the District Court's oral direction. The District Court did not render any written opinion.

By opinion filed February 6, 1978, the Court of Appeals affirmed the District Court's Order (Appendix A annexed hereto). The Court of Appeals had previously entered a stay of the District Court's Order pending the appeal, and in its opinion affirming the District Court the Court of Appeals further temporarily stayed enforcement for fourteen days in order to permit application for a further stay to be made to the Supreme Court. As previously noted, Mr. Justice Marshall has ordered such a further stay pending determination on the within petition.

Reasons for Granting the Writ

1. The Court of Appeals' decision conflicts with decisions of six other Circuit Courts of Appeals on the issue of whether enforcement of an Internal Revenue Service summons is improper where the summons has been issued solely for a criminal investigation.

On December 13, 1977, this Court granted a petition by the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in *United States* v. *LaSalle Nat. Bank*, 554 F.2d 302 (7th Cir. 1977), cert. granted December 13, 1977 (46 U.S.L.W. 3384). In *LaSalle*, the Court of Appeals held that an IRS summons is issued in bad faith, and is therefore unenforceable, if it is issued solely for the purpose of criminal investigation, even if it is issued prior to a recommendation for criminal prosecution. The same holding has been reached by a majority of the Courts of Appeals that have ruled on the issue—see, *e.g.*, *United States* v. *Zack*, 521 F.2d 1366 (9th Cir. 1975); *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975); *United States* v. *Genser and Forman*, —— F.2d ——, 41 A.F.T.R. 2d 78-816 (3d Cir. 1978); *United States* v. *Lafko*, 520 F.2d 622 (3d Cir. 1975); *United States* v. *Wright Motor Co., Inc.*, 536 F.2d 1090 (5th Cir. 1976); *United States* v. *Roundtree*, 420 F.2d 845 (5th Cir. 1970); *United States* v. *Wall Corp.*, 475 F.2d 893 (D.C. Cir. 1972); *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970); prior to the Court of Appeals' decision in this case, only one Court of Appeals had rejected that proposition (see *United States* v. *Troupe*, 438 F.2d 117 (8th Cir. 1971)). This Court granted the Government's petition for a writ of certiorari in *LaSalle* in order to reconcile the conflict.*

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* This conflict arises out of the Courts of Appeals' attempts to interpret this Court's decisions in *Reisman* v. *Caplin*, 375 U.S. 440 (1964) and *Donaldson* v. *United States*, 400 U.S. 517 (1971).

In the present case, the Court of Appeals expressed its rejection of the majority view (Slip Op. 1489-90).

Accordingly, and for the additional reason set forth in Point 2, *infra,* it is respectfully submitted that a grant of certiorari in this case would be especially appropriate as a companion case to the *LaSalle* case which is now pending before this Court. This is particularly appropriate in view of the fact that the United States in the *LaSalle* case, in its reply brief to this Court, quoted extensively and placed great reliance upon the Circuit Court's decision in this case.*

Indeed, that portion of the Court of Appeals' decision in this case that the Government's reply brief before this Court in *LaSalle* relies upon is based upon a demonstrably false premise, which the Government in *LaSalle,* in it reliance upon that decision, has not brought to this Court's attention. The Court of Appeals' decision here states that "[w]e start from the premise that investigations of taxpayers that would develop evidence of criminal but not of civil tax liability must be rare; indeed, petitioners have pointed to none". (Slip Op. at 1490). This assertion by the Court of Appeals is simply inaccurate. Merely as illustrations, prosecutions under 26 U.S.C. §§ 7203, 7204, 7205, 7206, and 7207, and 18 U.S.C. §§ 371 and 1001 arising out of investigations conducted by the IRS, do not necessarily require any showing of any civil tax liability whatsoever. Indeed, even in situations where there may eventually develop a conceivable future interest by the IRS in a taxpayer's civil tax liability, any such potential future interest may be completely absent when a particular special agent issues a particular summons

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* See reply brief for petitioners in the Supreme Court of the United States in *United States* v. *LaSalle,* No. 77-365, at pp. 2, 6 and 1(a)-15(a) thereof.

in a particular investigation involving alleged violations of 26 U.S.C. § 7201; illustratively, in *LaSalle* the Circuit Court affirmed the District Court's finding that the special agent who issued the summonses did so only for the purpose of criminal investigation with no interest in any civil tax liability. Finally, it is precisely those cases in which there is possible criminal but no civil tax liability that the abuse of process is most likely to occur.

2. The Court of Appeals' decision also conflicts with the decisions of the Third and Seventh Circuit Courts of Appeals on the issue of the necessary factual showing that an intervening taxpayer must make in order to be granted a hearing and/or discovery on the question of whether an IRS summons has been issued solely for the improper purpose of criminal investigation.

The Court of Appeals in this case held that:

> "Even if we were to subscribe to the reading given *Donaldson* by *LaSalle National Bank* and other cases, petitioners made no showing sufficient to call for an evidentiary hearing or discovery on whether the summons was to be used solely to develop evidence for prosecution." (Slip Op. at 1490)

This holding is in direct conflict with the holdings of the United States Courts of Appeals for the Third and Seventh Circuits in *McCarthy* and *LaSalle, supra.*

In this case, in support of their request for a hearing and/or discovery to determine whether the summons had been issued solely for the purpose of criminal investigation, petitioners submitted an affidavit of a third-party accountant who swore that the special agent who had issued the summons had stated, in his presence, that that

agent's "only remaining interest was in his criminal investigation of Roger Keech". (Petitioners also supported their request for a hearing and/or discovery on other factual grounds, discussed *infra*.) The Circuit Courts in both *McCarthy* and *LaSalle* held that such an alleged statement by the special agent who has issued a summons is sufficient to entitle the target of the investigation to an evidentiary hearing to determine whether the summons was issued solely for the purpose of a criminal investigation. Thus, in *McCarthy* the Third Circuit Court of Appeals held that the taxpayers' allegation

> "that in a conversation with agents who were members of the intelligence division, defense counsel was informed that the agents were conducting a criminal investigation of defendant-corporation . . . sufficiently raise[d] the possibility that the IRS agents charged with the investigation of defendant-corporation had no intention of pursuing any civil remedies as to bring into question their good faith. We therefore hold that the district court should conduct a hearing concerning the issues raised by these allegations." (514 F.2d at 375)

The conflict between *McCarthy* and the Court of Appeals' decision in this case was tacitly recognized by the Government which, in its reply memorandum in the District Court in this case, called the Third Circuit Court of Appeals' decision in *McCarthy* "confusing in its language and its holding", and stated:

> "If the *McCarthy* opinion stands for the proposition that allegations that an investigation is being conducted by a Special Agent and that the Special Agent has stated that he is conducting a 'criminal' investigation are sufficient to require a hearing on the issue of whether the summons was issued in bad faith as 'solely' in aid of a criminal prosecution, the Government submits the opinion should not be followed." (See Joint Appendix in Court of Appeals, at page A-33)

The decision of the Court of Appeals in this case similarly conflicts with the Seventh Circuit's decision in *LaSalle*, where that Court held that the special agent's statement that "'his investigation was strictly related to criminal violations' of the Internal Revenue Code"* was not only sufficient to entitle the taxpayers to an evidentiary hearing on whether the summons had been issued solely for criminal purposes, but was sufficient to warrant the conclusion that such was the sole purpose for the summons even where the special agent expressly denied at a hearing that this was its purpose. In the present case, to the contrary, the Court of Appeals held that the statement ascribed to the special agent—that "his only remaining interest was in his criminal investigation of Roger Keech"—even if such a statement had been made, "would prove nothing that would justify rejection of the Government's [enforcement] petition" (Slip Op. at 1491), and that the taxpayers would not be entitled to a hearing or to any discovery in order to determine whether the summons had been issued solely for the purpose of criminal investigation. This holding, it is respectfully submitted, directly conflicts with the above-described holdings of the Third and Seventh Circuit Courts of Appeals in *McCarthy* and *LaSalle*. The Court of Appeals' decision does not mention this conflict and does not even address the *McCarthy* and *LaSalle* holdings with respect

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* 554 F.2d at 304.

to the issue of the necessary evidentiary threshhold to entitle a taxpayer to a hearing and/or discovery, even though the resolution of this issue by those Circuit Courts was expressly brought to the Court of Appeals' attention by the petitioners in the proceedings below.

This conflict between the Court of Appeals' decision and the decisions of the Circuit Courts in *McCarthy* and *LaSalle* is heightened by the fact that in the present case the taxpayers supported their assertion that the summons had been issued solely for the improper purpose of criminal investigation with an added factual circumstances not present in either *McCarthy* or *LaSalle*. With respect to the years 1972 and 1974—two of the four years which the summons states are under investigation, i.e., 1972*-1975—the taxpayers have already been audited by the IRS with a determination made that their returns were correct as filed and that there was no additional tax due. Obviously, "if the civil liability were already determined, the summons would appear to be solely for a criminal purpose." *United States* v. *Wall Corp., supra,* 475 F.2d at 895.

In this connection, the present pendency of the *LaSalle* case before this Court further adds to the propriety of this Court's granting a writ of certiorari in this case; for if the decision of the Court of Appeals in *LaSalle* is affirmed on certiorari, an integral aspect of the procedure

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* In its enforcement petition in the District Court the Government sought enforcement of the summons only with respect to the years 1973-1975, purporting to exclude 1972. The Court of Appeals' opinion, in eliminating the 1972 situation from consideration because of the Government's disclaimer as to 1972 in its enforcement petition (see Slip Op. 1483 (n. 3)), is in direct conflict with this Court's holding in *Couch* v. *United States,* 409 U.S. 322, 329, n. 9 (1973) that "the rights and obligations of the parties became fixed when the summons was served".

to be applied in summons enforcement proceedings would of necessity be the issue of the necessary evidentiary showing that a taxpayer must satisfy in order to obtain an evidentiary hearing and/or discovery as to whether a summons issued prior to a recommendation for criminal prosecution has been issued solely for the improper purpose of criminal investigation. And on this issue, as stated, the holding of the Court of Appeals in this case directly conflicts with the holdings of the Courts of Appeals in *LaSalle* and in *McCarthy*.

CONCLUSION

For the above reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

BENDER & FRANKEL,
Attorneys for Petitioners.

LOUIS BENDER,
SANDOR FRANKEL,
Of Counsel.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 622—September Term, 1977.

(Argued January 11, 1978 Decided February 6, 1978.)

Docket No. 77-6191

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

MORGAN GUARANTY TRUST COMPANY,

Respondent,

and

ROGER L. KEECH and SANDRA J. KEECH,

Intervenors-Appellants.

Before:

FRIENDLY and VAN GRAAFEILAND, *Circuit Judges,* and DOOLING, *Senior District Judge.**

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* Of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

Appeal by taxpayers-intervenors from an order of the District Court for the Southern District of New York, Robert L. Carter, *Judge,* granting enforcement of a summons issued under I.R.C. § 7602 to Morgan Guaranty Trust Company to produce described bank records relating to intervenors.

Affirmed.

LOUIS BENDER, Esq., New York, N.Y. (Sandor Frankel, Esq., and Bender & Frankel, Esqs., New York, N.Y., of Counsel), *for Intervenors-Appellants.*

GAINES GWATHMEY, III, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and William G. Ballaine, Assistant United States Attorney, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

The United States filed a petition in the District Court for the Southern District of New York under I.R.C. §§ 7402 (b) and 7604(a), to enforce a summons issued under the authority of the Secretary of the Treasury pursuant to I.R.C. § 7602.[1] The petition was supported by an affidavit

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[1] This provides:

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining

(Footnote continued on following page)

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of I.R.S. Special Agent Alexander Dombroski, who had issued the summons. The summons had directed Morgan Guaranty Trust Company

> to appear before Special Agent A. Dombroski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers and other data:
>
> Signature card, ledger sheets, or transcripts of accounts for any and all savings, or checking accounts

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(Footnote continued from preceding page)

the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Aug. 16, 1954, c. 736, 68A Stat. 901; Oct. 4, 1976, Pub. L. 94—455, Title XIX, § 1906(b) (13) (A), 90 Stat. 1834.

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and Certificates of Deposits in the names of Roger L. and/or Sandra J. Keech covering the period 1972 through 1975. Also, any records, to include application and record of repayments relating to loans, mortgages and letters of credit.

Mr. and Mrs. Keech (the taxpayers) were notified of the issuance of the summons and directed the bank not to comply. Exercising the right given them by I.R.C. § 7609 (b), added by the Tax Reform Act of 1976, they intervened and stayed compliance with the summons.[2]

Taxpayers submitted an opposing affidavit of counsel, alleging that the summons was not issued "in good faith, in that said summons was issued solely in aid of a criminal investigation of the taxpayers." They contended that such a summons is "improper, unauthorized and unenforceable."

This claim is rested on three factual bases:

(1) The summons was issued by a Special Agent assigned to the Intelligence Division of the IRS, the

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[2] The quid pro quo for this newly accorded statutory right is § 7609(e). This provides:

(e) Suspension of statute of limitations.—If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

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function of which is the enforcement of criminal statutes relating to taxes; the Special Agent had issued eleven other summonses during the course of his investigation.

(2) The Special Agent had allegedly stated that he was conducting a "criminal investigation of Roger Keech."

(3) The summons stated that the investigation related to the four-year period 1972-75 but the taxpayers had been previously audited for 1972 and 1974 and these audits had been completed with a determination of no additional tax due.

For proof of the statement mentioned in (2), taxpayers relied on an affidavit of William G. Woolridge, a tax accountant in the employ of Chromalloy American Corporation (Chromalloy). Woolridge stated that on August 15, 1971, he had been present at the office of Arrow Group Industries, Inc. (Arrow), a Chromalloy subsidiary of which Roger Keech was president, and met with IRS agents including Special Agent Dombroski, who were conducting an audit of Arrow. As Dombroski left the Arrow premises with Arrow records he had previously requested in connection with his investigation of Keech, an unnamed Arrow employee asked whether production of the records cleared up everything as between Dombroski and Arrow. Allegedly Dombroski "responded in the affirmative and further stated, in substance, that his only remaining interest was in his criminal investigation of Roger Keech." Taxpayers asked that the Government's enforcement petition should be dismissed or, in the alternative, that an evidentiary hearing be held to determine whether the summons was issued solely in aid of a criminal investigation, with discovery to precede this.

Appendix A

The Government countered with a supplemental affidavit of Dombroski and an affidavit of Charles Lazarus, an IRS agent in the Audit Division, which handles civil enforcement. Dombroski stated that in February, 1977, he had been assigned to the investigation of the 1973, 1974 and 1975 returns of the taxpayers jointly with the Audit Division; that the investigation had not yet progressed sufficiently to warrant a decision whether or not to recommend criminal prosecution; and that if he determined not to recommend this, the Audit Division would decide whether there were liabilities for additional taxes and civil fraud penalties. He admitted he had told an Arrow employee, Theodore Beindorf, that he regarded Arrow as having satisfied the summons issued to it but that his investigation of Mr. Keech was ongoing. He denied having used the word "criminal" although conceding that "in point of fact the joint investigation is criminal as well as civil in nature." With respect to the third point in counsel's affidavit, he noted that he was only investigating the Keech's 1973, 1974 and 1975 returns,[3] and that, in accordance with I.R.C. § 7605(b), the IRS had notified taxpayers that further information made it necessary to reexamine their books and records for 1974. He thus failed to understand the relevance of counsel's reference to the previous audit. Lazarus affirmed the Audit Division's participation in the joint investigation. He then stated that he was familiar with the file and that it contained

> a) no determination of whether there exists unreported income attributable to the taxpayer for the years in question; b) no determination to recommend criminal

[3] The Government has disclaimed any request for enforcement of the summons in regard to the tax year 1972.

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> prosecution of either Sandra J. Keech or Roger L. Keech and c) no determination of whether grounds exist to institute a civil action seeking to recover additional taxes and/or fraud penalties under the Internal Revenue Code.

and that

> The bank records sought by the IRS summons issued to respondent may be necessary to determine all these issues.

His affidavit concluded with a paragraph which we quote in the margin.[4]

The taxpayers submitted no further affidavits. After hearing argument Judge Carter granted the Government's petition and taxpayers appealed. Meanwhile enforcement has been stayed.

[4] Given the present status of the joint investigation, there are two potential future dispositions. First, Special Agent Dombroski could decide to recommend prosecution, in which event my function would be to submit a Revenue Agent's Report stating the Audit Division's computation of any taxes due. This report would end my involvement in the matter at least until disposition of the criminal aspect of the investigation. Second, Special Agent Dombroski could determine that the facts disclosed by the joint investigation did not warrant the recommendation of a criminal prosecution, in which event he would issue a Discontinued Investigation Report. After the issuance of such a report, the matter would be returned to the Audit Division and to me for a determination of whether to recommend an assessment for additional taxes and/or seek civil fraud penalties. To reiterate, Special Agent Dombroski has informed me that the joint investigation has not developed sufficiently to warrant a decision by him on either of the options discussed in this paragraph.

Appendix A

DISCUSSION

The question how far a summons issued under I.R.C. § 7602 is open to attack because of its relation to a criminal prosecution has been much litigated in recent years. Since we hopefully will receive further enlightenment on the subject as a result of the grant of certiorari, 46 U.S.L.W. 3384 (Dec. 13, 1977), to review *United States* v. *LaSalle National Bank*, 554 F.2d 302 (7 Cir. 1977), a summary of the doctrinal history will suffice.

There is nothing on the face of the statute, see note 1 *supra*, which prevents its utilization in aid of an investigation with a potential for criminal rather than merely civil prosecution of a taxpayer. Indeed, in its latest decision on the subject, the Supreme Court seems to us to have so declared, *Donaldson* v. *United States*, 400 U.S. 517, 535 (1971). Current dubieties have their origin in a dictum in *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964), where, in upholding the denial of injunctive and declaratory relief to a taxpayer's attorneys in a suit against the Commissioner of Internal Revenue and an accounting firm with respect to reports produced by the latter at the attorneys' request for use in civil and criminal litigation against the taxpayer, the Court said:

> Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker*, 239 F.2d 767, 772-773, as well as that it is protected by the attorney-client privilege, *Sale* v. *United States*, 228 F.2d 682.

Appendix A

If *Boren* v. *Tucker* constituted the limit of what the Court had in mind, the restriction placed on I.R.C. § 7602 would not be very great. There the court of appeals, after having propounded the question whether use of the word "correctness" in § 7602 would "prevent examination [of a taxpayer's records] for purpose[s] of securing evidence for a criminal prosecution?", answered in the negative. Referring to what the court characterized as the taxpayer's "only authority on this aspect of his position," *United States* v. *O'Connor*, 118 F. Supp. 248, 250 (D. Mass. 1953), the opinion correctly characterized Judge Wyzanski's opinion in that case as holding only that the predecessor to § 7602 "did not authorize an agent to issue a subpoena, merely to aid the prosecution of a *pending* criminal action by the Department of Justice." *Boren* v. *Tucker*, *supra*, 239 F.2d at 772 (emphasis in original).[5]

The argument for a restrictive reading of § 7602 was not advanced by *United States* v. *Powell*, 379 U.S. 48, 58 (1964). Although Mr. Justice Harlan declared that a court may not permit its process in enforcing a summons to be abused, his examples of "abuse" were:

> Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

Nothing was said to indicate that an intention by the Commissioner to uncover criminal tax liability would reflect "on

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[5] The court of appeals listed five factors which were present in *O'Connor* but were absent both in *Boren* and here, 239 F.2d at 772.

the good faith" of the inquiry, and the rule of *ejusdem generis* would dictate the contrary.

This was the background against which the Court decided *Donaldson* v. *United States, supra,* 400 U.S. 517, 532-36, a case which like this involved the enforcement of a third party summons issued by a Special Agent. The Court referred to the dictum in *Reisman* v. *Caplin;* to subsequent decisions of courts of appeals approving "the use of a summons in an investigation that is likely to lead to civil liability as well as to criminal prosecution" or "even where it is alleged that its purpose is to uncover crime, if no criminal prosecution as yet has been instituted"; and to other decisions holding that "where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied." After giving as an instance of this "the case where a criminal prosecution has been instituted and is pending at the time of issuance of the summons," the Court said, 400 U.S. at 533:

> It is precisely the latter situation—where the sole object of the investigation is to gather data for criminal prosecution—that is the subject of the *Reisman* dictum. This is evident from the fact that the dictum itself embraces the citation of *Boren* v. *Tucker,* 239 F.2d 767, 772-773 (CA9 1956), an opinion in which, at the pages cited, the Ninth Circuit very carefully distinguished *United States* v. *O'Connor,* 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already was under indictment. The *Reisman* dictum is to be read in the light of its citation of *Boren,* and of *Boren's* own citation of *O'Connor;* when so read, the dictum comes into proper focus as applicable to the

> situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes.

The Court then went on to point out that Donaldson was not under indictment; that no recommendation had been made for his prosecution; that whether he ever would be prosecuted would depend on the result of the audit; and that, as noted above, there is nothing in § 7602 restricting "use of the summons for investigation into criminal conduct." [6] The opinion concluded, 400 U.S. at 536:

> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Other courts of appeals have subjected the *Donaldson* opinion to lengthy textual exegesis reminiscent of scholastic philosophers or Talmudists. The results are summarized in Judge Pell's opinion for the Seventh Circuit in the *LaSalle National Bank* case, *supra,* 554 F.2d at 302, now before the Court on certiorari. In particular the two pas-

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[6] The Court also stated:

> Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. . . . There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law.

400 U.S. at 535-36 (citations omitted).

sages quoted have been thought to be in contradiction, or at least to be so unless the words "issued in good faith" in what the Court characterized as its holding are read to encompass investigations for the sole purpose of finding a basis for criminal prosecution rather than what Mr. Justice Harlan seems to have meant when he used those words in *Powell*. Courts taking this view have held that a warrant issued in an investigation "solely for criminal purposes" is not "issued in good faith" and "is impermissible . . . even though there has been no recommendation for prosecution." *United States* v. *Zack*, 521 F.2d 1366, 1368 (9 Cir. 1975). See, e.g., *United States* v. *LaSalle National Bank, supra*, 554 F.2d at 308-09. The Government, by contrast, argues that a summons is valid as long as criminal prosecution has not been recommended by the IRS to the Department of Justice. Br. at 10.[7]

If there were not good grounds for hope that the Supreme Court itself will soon clear away the underbrush, we would be inclined to reconcile the disparity between the quoted passages, if such there be,[8] on the basis that the

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[7] The issue has not been decided in this circuit. In *United States* v. *Asphalt Materials, Inc.*, 77-1 U.S.T.C. 86,189 (W.D.N.Y. 1976), *aff'd by order*, 77-1 U.S.T.C. 87,140 (2 Cir. 1977), *cert. denied*, 46 U.S.L.W. 3262 (1977), the district court apparently adopted the "sole purpose" test advanced by the taxpayers here, and in particular the "already formed a firm purpose to recommend prosecution" variant. However, the district court also found that the taxpayers had not shown that the sole purpose of the summons was for a criminal investigation and the appeal was by the taxpayer from that finding. See also Second Circuit Rules § 0.23.

[8] The disparity would disappear if the passage on p. 533 is read as characterizing the holdings of the courts of appeals rather than as

(Footnote continued on following page)

stated holding, rather than the passage on p. 533, was the real holding; that, so far as concerned use of a third party summons for criminal investigations, the Court was laying down an objective test, "prior to recommendation for criminal prosecution," that would avoid a need for determining the thought processes of special agents; and that the "good faith" requirement of the holding related to such wholly different matters as those mentioned in *Powell*. This seems to us to be the thrust of the opinion when it is read as a whole, particularly the discussion of the broad availability of the summons for criminal investigations, 400 U.S. at 535-36. Such a view would also be consistent with the only rationale that has ever been offered for preventing an otherwise legitimate use of an Internal Revenue Service third party summons, namely that Congress could not have intended the statute to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case, see *United States* v. *O'Connor, supra*, 118 F. Supp. at 250-51. Such considerations are scarcely applicable when no responsible government official has yet made any determination with respect to the propriety of a prosecution.

However, so far as this case is concerned, we find no necessity for making such a decision for the period until the Court speaks again. Even if we were to subscribe to the reading given *Donaldson* by *LaSalle National Bank*

(Footnote continued from preceding page)

approving all of them, particularly the "sole purpose" cases. The Court had preceded its reference to the latter cases by the cautionary phrase "it has been said." Also in view of the use of the phrase "at most," the Court can hardly have meant to give unqualified approval to the *Reisman* dictum.

and other cases, petitioners made no showing sufficient to call for an evidentiary hearing or discovery on whether the summons was to be used solely to develop evidence for prosecution.

We start from the premise that investigations of taxpayers that would develop evidence of criminal but not of civil tax liability must be rare; indeed, petitioners have pointed to none. To be sure, a taxpayer can violate I.R.C. § 7206(1) or the misdemeanor section, § 7207, by making a wilfully false statement even though no further tax is due. See *United States* v. *Tsanas,* decided Jan. 13, 1978 slip opinions 1077, 1080-82. *Prima facie,* however, when the Audit Division and the Intelligence Division cooperate in an investigation, their interest is in establishing a deficiency which may be the basis for a civil recovery, with or without fraud penalties, a criminal prosecution, or both. Both Special Agent Dombroski and Agent Lazarus swore that this was the case here. Thus, the involvement of the Special Agent in the investigation (as was also the case in *Donaldson*) in no way detracts from the conclusion that the investigation served both criminal and civil purposes. All that was brought up against this was Woolridge's affidavit that the Special Agent had said to an Arrow employee, unnamed by him but named by Dombroski, that, after getting the additional records from Arrow "his [Dombroski's] only remaining interest was in his criminal investigation of Roger Keech." Even assuming that Dombroski had in fact said this, which he denied, it would prove nothing that would justify rejection of the Government's petition. While under IRS procedures Dombroski's own interest was in determining whether he should recommend a prosecution, neither the making of such a recommendation nor the failure to make one would lessen the

IRS' appropriate interest in determining whether the taxpayers were liable for deficiencies and penalties. Finally, we find Dombroski's answer to the taxpayers' third argument more than sufficient. The IRS is interested in only one year for which the Keeches have been previously audited, and as to that year the taxpayers, pursuant to statute, have been advised of the Service's need to reexamine their records to redetermine their tax liability. The mere need to reexamine previously audited books provides no evidence that solely criminal prosecution is intended. Even under the broadest reading of *Donaldson* as to the meaning of the phrase "issued in good faith," a taxpayer must show something more than was done here in order to be entitled to discovery[9] and an evidentiary hearing.

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[9] Citing *Powell, supra,* 379 U.S. at 58, n.18, and F.R.C.P. 81(a)(3), the taxpayers note that the Federal Rules of Civil Procedure apply to IRS summons enforcement proceedings. They therefore conclude that "at some stage prior to the District Court's ruling . . . discovery should . . . have been allowed", and cite a number of cases in which courts have ordered various degrees of discovery. E.g., *United States* v. *Roundtree,* 420 F.2d 845 (5 Cir. 1970) (deposition of IRS agent); *United States* v. *McCarthy,* 514 F.2d 368 (3 Cir. 1976) (evidentiary hearing to determine whether a summons was issued in good faith); *United States* v. *Wright Motor Co.,* 536 F.2d 1090 (5 Cir. 1976) (limited deposition of Special Agent).

However, F.R.C.P. 81(a)(3) contains the caveat: "except as otherwise provided by . . . rules of the district court or by order of the court in the proceedings." The 1946 Report of the Advisory Committee on Rules of Civil Procedure, commenting on F.R.C.P. 81(a)(3), stated:

> The provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determinations desired. . . . [I]t

(Footnote continued on following page)

Appendix A

The order of the district court is affirmed. The stay of enforcement of the summons is extended for fourteen days from the filing of this opinion and if, within that period, an application for a further stay pending a petition for certiorari is filed with the Supreme Court, until such application is determined.

(Footnote continued from preceding page)

is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful.

3 Legislative History of Rules of Civil Procedure 161 (1947 Amendments). The decision of the district court to deny discovery in this case constitutes an exercise of discretion which even the taxpayers' cases recognize should not be reversed unless discretion was abused. See *United States* v. *Wright Motors Co.*, 536 F.2d at 1093-94. The Supreme Court also recognized in *Donaldson, supra*, 400 U.S. at 528-29, that an application of the Rules which would destroy the summary nature of enforcement proceedings is not required. The specific discovery sought by the Keechs illustrates the drastic impact on IRS's investigations that the granting of such requests would create. Taxpayers asked that the court "order the IRS agents involved in this investigation to appear for depositions by the taxpayers' counsel prior to the hearing, with all books, records, reports, memoranda, and other documents relative to the issue of the purposes for the issuance of the summons and the nature of the investigation of the taxpayers." Intervenors' Memorandum of Law at 13. Such discovery would seriously delay not only criminal but civil investigation. See *United States* v. *Salter*, 432 F.2d 697, 700 (1 Cir. 1970). When these policy considerations are coupled with the Supreme Court's statement in *Powell*, 397 U.S. at 58, repeated in *Donaldson*, 400 U.S. at 527, that "the burden of showing an abuse of the Court's process is on the taxpayer," it is thus clear that the taxpayer must make a substantial preliminary showing before even limited discovery need be ordered. Compare *United States* v. *Newman*, 441 F.2d 165, 169 (5 Cir. 1971) (". . . the summoned party must raise in a substantial way the existence of substantial deficiencies in the summons proceedings. Only when so raised is there any need for an evidentiary hearing or—in anticipation of it—the traditional discovery mechanisms . . . with appropriate limitations."), with *United States* v. *Wright Motors, supra*, 536 F.2d at 1094.

APPENDIX B

Judgment of the United States Court of Appeals For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of February one thousand nine hundred and seventy-eight.

Present:

HON. HENRY J. FRIENDLY
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges
HON. JOHN F. DOOLING
District Judge

77-6191

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

MORGAN GUARANTY TRUST COMPANY,

Respondent,

and

ROGER L. KEECH and SANDRA J. KEECH,

Intervenors-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the intervenors-appellants.

A. DANIEL FUSARO
Clerk
By: ARTHUR HELLER
Deputy Clerk

APPENDIX C

Order of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Petitioner,

—v.—

MORGAN GUARANTY TRUST CO.,

Respondent,

and

ROGER L. KEECH and SANDRA J. KEECH,

Intervenors.

Petitioner having filed a petition, together with exhibits attached thereto, seeking enforcement of an Internal Revenue Service summons, and the United States District Court for the Southern District of New York having issued an order on October 6, 1977, directing respondent to appear before the United States District Court to show cause why the respondent should not be compelled to testify and produce the books, records and other papers

demanded in the Internal Revenue Service summons served upon the respondent on June 17, 1977, and taxpayers Roger L. Keech and Sandra J. Keech having thereafter intervened and, in connection therewith, having filed affidavits, sworn to by Sandor Frankel, Esq. and William G. Woolridge, opposing enforcement of the summons and requesting a hearing and discovery, and petitioner having filed supplementary affidavits sworn to by Special Agent Alexander Dombroski and Revenue Agent Charles Lazarus, and no papers having been filed by respondent, and argument having been heard at or about 11 a.m. on November 18, 1977 before the Honorable Robert L. Carter, United States District Judge, and petitioner having appeared at the hearing and requested enforcement of the IRS summons, and intervenors having appeared at the hearing in opposition to the petition and in support of their application for a hearing and discovery; nôw, upon all of the papers and proceedings herein, it is hereby

ORDERED that intervenors' application is denied and that respondent Morgan Guaranty Trust Co. shall comply fully with the Internal Revenue Service summons served upon the respondent on June 17, 1977 by appearing before Special Agent Alexander Dombroski or some other authorized officer of the Internal Revenue Service, at Room 204, 200 Sheffield Street, Mountainside, New Jersey at 10 a.m. on November 23, 1977 or at an adjourned time and date agreed to by Special Agent Dombroski, and to give all testimony and produce all books, records, papers and other data described in the summons.

Dated: New York, New York
November 18, 1977.

ROBERT L. CARTER
U. S. D. J.

No. 77-1586

FILED
JUL 14 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROGER L. KEECH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1586

ROGER L. KEECH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the decision below enforcing an internal revenue summons for the production of bank records on the ground that the summons was issued solely for purposes of a criminal investigation and that they were entitled to an evidentiary hearing on this claim.

The pertinent facts are as follows: In February 1977, Special Agent Alexander Dombroski of the Intelligence Division of the Internal Revenue Service

was assigned to a joint investigation with the Audit Division of petitioners' income tax returns for 1973-1975. Thereafter, on June 17, 1977, Dombroski issued a summons requiring Morgan Guaranty Trust Company to produce records relating to petitioners' transactions with the bank. Pursuant to 26 U.S.C. 7609(b)(2), petitioners exercised their right to stay compliance with the summons by directing the bank not to comply (Pet. App. A, pp. 3a-4a, 6a).

The government thereupon brought this summons enforcement proceeding in the United States District Court for the Southern District of New York pursuant to 26 U.S.C. 7402(b) and 7604(a). Petitioners intervened in the proceeding and filed an affidavit alleging that the special agent had stated that he was conducting a "criminal investigation of Roger Keech" (Pet. App. A, pp. 2a-4a).

The affidavit filed on behalf of petitioners was executed by William G. Woolridge, a tax accountant in the employ of Chromalloy American Corporation. Woolridge stated that he had met with Internal Revenue agents, including Special Agent Dombroski, at the office of Arrow Group Industries, Inc., a Chromalloy subsidiary of which petitioner Roger Keech was president. Woolridge alleged that as Special Agent Dombroski left the Arrow premises with Arrow records that he had previously requested in connection with his investigation of petitioner, an unnamed Arrow employee asked whether production of the records cleared up everything with respect to Arrow. Dombroski allegedly "responded in the affirmative

and further stated, in substance, that his only remaining interest was in his criminal investigation of Roger Keech" (Pet. App. A, p. 5a).

The government responded with affidavits of Special Agent Dombroski and of Charles Lazarus, an Internal Revenue agent in the Audit Division, which is responsible for civil enforcement. Dombroski stated that he had been assigned to investigate petitioners' tax returns for 1973-1975 jointly with the Audit Division; that the investigation had not yet progressed sufficiently to warrant a decision whether or not to recommend criminal prosecution to the Department of Justice; and that even if he determined not to recommend prosecution, the Audit Division would still be required to determine whether petitioners were liable for additional taxes and civil fraud penalties. Dombroski acknowledged that he told an Arrow employee that he regarded Arrow as having satisfied the summons issued to it but that his investigation of petitioner Roger Keech was ongoing. While Dombroski denied using the term "criminal" to characterize his investigation of Roger Keech, he stated that "in point of fact the joint investigation is criminal as well as civil in nature" (Pet. App. A, p. 6a).

Agent Lazarus' affidavit confirmed the Audit Division's participation in the joint investigation. He stated that he was familiar with the file and that it contained a) no determination whether petitioners had unreported income for the years in question; b)

no determination whether to recommend criminal prosecution of petitioners; and c) no determination whether petitioners were liable for additional taxes and civil fraud penalties. Lazarus further stated that given the status of the joint investigations, there were two potential future dispositions. First, Agent Dombroski could recommend prosecution, in which event Lazarus would submit a revenue agent's report computing the additional taxes due. The submission of this report would end Lazarus' involvement in the matter at least until disposition of the criminal aspect of the investigation. Second, Special Agent Dombroski could determine that the facts did not warrant the recommendation of prosecution, in which event the matter would be returned to Agent Lazarus for a determination whether to recommend the assessment of additional taxes and civil fraud penalties (Pet. App. A, p. 7a and n. 4).

After hearing oral argument, the district court ordered enforcement of the summons (Pet. App. A, p. 7a; Pet. App. C, pp. 19a-20a). The court of appeals affirmed (Pet. App. A, pp. 8a-16a). In its view, this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517, established an objective test—"prior to recommendation for criminal prosecution"—that would avoid a need for determining the thought processes of special agents. The court construed the requirement of *Donaldson* that the summons be issued in "good faith" to render unenforceable a summons that was an abuse of the court's process, *viz.*, harassment or improper pressure upon the taxpayer (*United*

States v. *Powell*, 379 U.S. 48, 58) (Pet. App. A, p. 13a).

The court of appeals further held that even if the *Donaldson* good faith requirement would render unenforceable a summons issued solely for purposes of a criminal tax investigation, "petitioners made no showing sufficient to call for an evidentiary hearing or discovery on whether the summons was to be used solely to develop evidence for prosecution" (Pet. App. A, p. 14a). As the court observed, both Special Agent Dombroski and Agent Lazarus swore that their interest was in determining whether there was a deficiency in petitioners' tax liabilities that may be the basis of a civil recovery, with or without fraud penalties, a criminal prosecution, or both. Moreover, even assuming Dombroski said that his only remaining interest was in the criminal investigation, the court noted that such a statement simply reflected his function under IRS procedures and that "neither the making of * * * a recommendation [for prosecution] nor the failure to make one would lessen the IRS' appropriate interest in determining whether [petitioners] were liable for deficiencies and penalties" (Pet. App. A, pp. 14a-15a).

1. In *United States* v. *LaSalle National Bank*, No. 77-365, decided June 19, 1978, the Court held that the primary requirement for enforcing a summons under 26 U.S.C. 7602 is that it be issued before the Internal Revenue Service recommends to the Department of Justice the initiation of a criminal prosecution relating to the subject matter of the summons.

The Court further ruled that enforcement of a summons is also conditioned upon the good faith use of the summons authority by the Internal Revenue Service, which must not abandon its institutional responsibility to determine and collect taxes and civil fraud penalties.

In so holding, the Court observed that "[t]he institutional responsibility of the Service to calculate and to collect civil fraud penalties and fraudulently reported or unreported taxes is not necessarily overturned by a single agent who attempts to build a criminal case. The review process over and above his conclusions is multilayered and thorough" (slip op. 16). The Court further stated that "this means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service" (slip op. 18). The Court characterized this burden as "a heavy one"; "[b]ecause criminal and civil fraud liabilities are coterminous, the Service rarely will be found to have acted in bad faith by pursuing the former" (*ibid.*).

Here, the special agent's and the revenue agent's affidavits amply supported the court of appeals' conclusion that "petitioners made no showing sufficient to call for an evidentiary hearing or discovery on whether the summons was to be used solely to develop evidence for prosecution" (Pet. App. A, p. 14a). Indeed, the sworn statements of the agents that the summons was issued for both civil and criminal purposes was uncontested. Moreover, the dual character of the investigation is further demonstrated here by

the fact that a revenue agent, whose function is to determine civil tax liability, is assigned to the case. Finally, the agents swore that there had been no determination whether to recommend either criminal prosecution or the assessment of additional civil liabilities or fraud penalties. In these circumstances, petitioners have not met their burden of proving that the Internal Revenue Service has abandoned its institutional responsibility to determine and collect taxes.[1]

2. Contrary to petitioners' further argument (Pet. 9-13), the decision below does not conflict with *United States* v. *McCarthy*, 514 F.2d 368 (C.A. 3). There, the court held that the taxpayers were entitled to an evidentiary hearing with respect to their allegations of lack of good faith in issuance of an internal reve-

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[1] Petitioners' assertion (Pet. 12) that they were previously audited for 1972 and 1974, two of the years under investigation, with no change in their reported tax liability does not rebut the presumption in favor of a civil aspect to the Service's inquiry. As the court of appeals observed (Pet. App. A, p. 6a n. 3), the government disclaimed any request for enforcement of the summons with respect to 1972. Moreover, contrary to petitioners' argument (Pet. 12), *Couch* v. *United States*, 409 U.S. 322, 329 n. 9, does not support their claim that the year 1972 is still at issue. The Court's statement in *Couch* that the "rights and obligations of the parties became fixed when the summons was served" refers to the inability of the possessor of records requested by a summons to defeat enforcement by transferring the records to another person.

With respect to 1974, the Internal Revenue Service notified petitioners, pursuant to 26 U.S.C. 7605(b), that further information made it necessary to reexamine their books and records for that year (see Pet. App. A, p. 6a). There is accordingly no basis for petitioners' claim that their prior audit terminated the civil aspect of the investigation.

nue summons on the ground of harassment.[3] Here, however, petitioners have not alleged any harassment or other improper purpose that might justify an evidentiary hearing. *United States* v. *Powell*, *supra*; *United States* v. *LaSalle National Bank*, *supra*, slip op. 15; cf. *United States* v. *Church of Scientology of California*, 520 F.2d 818 (C.A. 9); *United States* v. *Salter*, 432 F.2d 697 (C.A. 1). The only fact alleged by petitioners is that Special Agent Dombroski stated that his only remaining interest was in the criminal investigation of Roger Keech, although Dombroski denied using the term "criminal." But as this Court pointed out in *LaSalle National Bank*, "the inquiry into the criminal enforcement objectives of the agent would delay summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator" (footnote omitted) (slip op. 17)—a process the Court characterized as "undesirable and unrewarding" (slip op. 18). Petitioners have therefore alleged no fact that would disprove the existence of a valid civil tax determination or collection purpose by the Internal Revenue Service. There is accordingly no basis to their claim for an evidentiary hearing.

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[3] In *McCarthy*, the taxpayers also alleged, as do petitioners here, that a prior audit demonstrated that the current investigation was not being conducted in good faith as a civil investigation. However, the court found that these allegations were insufficient to raise the possibility of bad faith, observing that there was no claim that the Service had pursued all available civil remedies with respect to each of the years currently under investigation, including fraud penalties (see 514 F.2d at 375).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.

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Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1978

No. 77-1586

ROGER L. KEECH and SANDRA J. KEECH,

Petitioners,

—against—

UNITED STATES OF AMERICA and
MORGAN GUARANTY TRUST COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

Petitioners' original brief set forth (at pp. 2-3) the two questions presented by this petition*. Respondent's memo-

*"1. Whether the Internal Revenue Service may lawfully issue an administrative summons solely for the purpose of a criminal investigation.

2. Whether the Court of Appeals properly held that the intervening taxpayers did not allege sufficient facts to entitle them to a hearing on their claim that the summons had been issued solely for criminal purposes, where the taxpayers made the same factual showing that has been held adequate to warrant a hearing by the United States Courts of Appeals for the Third and Seventh Circuits."

randum in opposition apparently concedes—as it must—that the answer given to the first of these questions by the Court of Appeals in this case has been rejected by this Court's decision in *United States* v. *LaSalle National Bank*, No. 77-365, decided June 19, 1978, which held that even "prior to a recommendation for prosecution to the Department of Justice, the IRS must use its summons authority in good faith," and that a summons is not issued in good faith where the investigation has solely criminal purposes as determined "by an examination of the institutional posture of the IRS."

Respondent argues, however, that "petitioners have not met their burden of proving that the Internal Revenue Service has abandoned its institutional responsibility to determine and collect taxes." (see Government's opposing memorandum, at p. 7). It is respectfully submitted that this assertion misstates the issue in this case, and, furthermore, that respondent's argument in support of this proposition is based on a misreading of the record below and of the applicable case-law, including this Court's decision in *LaSalle*.

The issue is not whether petitioners have at this juncture proved that the IRS in an institutional sense has issued the summons in question solely for criminal purposes; rather, the issue is whether petitioners have alleged sufficient facts to entitle them to a hearing with appropriate discovery in order to attempt to satisfy their burden of proof. In support of their application for a hearing and/or discovery, petitioners submitted (among other things) a third-party affidavit swearing that the special agent in charge of this investigation has stated that his "only remaining interest was in his criminal investigation of Roger Keech."*

* In light of this affidavit and the petitioners' contention in the Courts below and in this Court that the summons was issued solely for criminal purposes, the statement in the respondent's opposing memorandum (at p. 6) that "the sworn statements of the agents that the summons was issued for both civil and criminal purposes was uncontested" is, to say the least, difficult to fathom.

Although under *LaSalle* the individual special agent's subjective motivation "is hardly dispositive", the statement made by the special agent in this case is certainly probative of the issue of whether the IRS in this case is acting in good faith in an institutional sense. Petitioners respectfully submit that where a special agent makes a statement such as has been attributed to Dombroski—and which for present purposes must be accepted as true since petitioners were not granted any evidentiary hearing or discovery—that is sufficient to entitle them to a hearing with appropriate discovery in order to satisfy "the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service," a burden which the *LaSalle* opinion characterized as a "heavy" one. The *LaSalle* opinion certainly could not have contemplated imposing such a heavy burden on a taxpayer opposing enforcement of a summons without giving that taxpayer any realistic means of satisfying that burden.

The disposition of the *LaSalle* case itself supports petitioners' position. In *LaSalle* the Circuit Court affirmed the District Court's denial of enforcement of the summons where the special agent had stated that " 'his investigation was strictly related to criminal violations' of the Internal Revenue Code"*. This Court in *LaSalle* did not direct enforcement of the summons, but remanded for further proceedings in the District Court. Under the position now being urged by respondent in this case, the appropriate disposition in *LaSalle* would have been a reversal with instructions to order enforcement of the summons, as the dissenting opinion in *LaSalle* urged but which the majority rejected. Accordingly, this Court's *LaSalle* decision has established that the showing made in the Court below by petitioners here, which was not less than the showing made

* 554 F.2d at 304.

by the respondents in *LaSalle*, entitles petitioners here to a hearing with appropriate discovery. It is most significant that although the striking similarity between the factual showings made by the objecting taxpayers in this case and in *LaSalle* was noted in the petition in this case (at pp. 11-12 thereof), the Government's opposing memorandum fails even to address that similarity.

A similar result was reached in *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975). Respondent's memorandum in opposition to the present petition completely distorts (at pp. 7-8) the Third Circuit's *McCarthy* decision by characterizing it as merely holding that the taxpayers were entitled to a hearing with respect to their allegation that the summons was issued for the purpose of harrassment rather than with respect to their allegation that the summons was issued solely for a criminal purpose. This is simply a misstatement of *McCarthy*, which expressly held that the taxpayers' allegation

> "that in a conversation with agents who were members of the intelligence division, defense counsel was informed that the agents were conducting a criminal investigation of defendant-corporation . . . sufficiently raise[d] the possibility that the IRS agents charged with the investigation of defendant-corporation had no intention of pursuing any civil remedies as to bring into question their good faith. We therefore hold that the district court should conduct a hearing concerning the issues raised by these allegations." (514 F.2d at 375).

In the instant case the Government itself recognized in the District Court that under *McCarthy* the petitioners in this case would be entitled to a hearing and/or discovery, and asked the District Court to reject the *McCarthy* decision (see Joint Appendix in Court of Appeals (hereinafter "JA") at p. A-33a).

It is respectfully submitted that this Court's decision in *LaSalle* renders the instant case an ideal one for review by this Court. This case squarely raises an issue that will now arise in innumerable summons enforcement proceedings in light of this Court's *LaSalle* decision: *i.e.*, when a taxpayer objects to enforcement of a summons on the ground that it is not issued in good faith in that the IRS in an institutional sense is conducting solely a criminal investigation and has abandoned its pursuit of civil tax determination or collection, what *prima facie* showing must that taxpayer make in order to be granted a hearing and/or discovery in order to resolve that issue?* Under this Court's decision in *LaSalle* and the Third Circuit's decision in *McCarthy*, the petitioners in this case were and are entitled to a hearing with appropriate discovery; yet the Second Circuit affirmed the District Court's denial of petitioners' application for such, and thus effectively completely foreclosed them from developing the full facts and circumstances concerning what they allege to be the true purpose, in an institutional sense, of the present investigation and the present summons: that is, solely for a criminal purpose.

The Government's memorandum in opposition to the petition also misstates the record in the District Court. The revenue agent's role in this investigation has not been "to determine civil tax liability" or to "determin[e] whether there was a deficiency in petitioners' tax liabilities that may be the basis of a civil recovery" (as the Government's opposing memorandum states at pp. 7 and 5, respectively). To the contrary, the affidavit of Revenue

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* The District Court in this case itself observed, when counsel for petitioners asked how a taxpayer could satisfy his burden without the opportunity of a hearing, "that is a problem, but I think that that has to be addressed to the Supreme Court of the United States and to the Courts of Appeal." (JA at A-37a).

Agent Lazarus acknowledged that his duties are "to assist the Intelligence Division's Special Agent assigned to the investigation, Alexander Dombroski, in the investigation and computation of any additional tax liability." (JA at A-30a). In other words, the revenue agent's role in this case is not to determine civil tax liability, but to the contrary, to seek evidence of one element to support a criminal tax prosecution, i.e., the computation of additional tax liability, if any.

The Government's opposing memorandum also states (at p. 7) that "the agent swore that there had been no determination whether to recommend either criminal prosecution or the assessment of additional civil liabilities or fraud penalties." Obviously, without being afforded any hearing or any discovery, petitioners were precluded by the District Court from any inquiry regarding these assertions. In this respect *LaSalle* is most instructive, for in that case the special agent stated under oath "that he had not made a determination in his own mind as to whether to recommend criminal prosecution"* and further "testified to the existence of a civil purpose but the district court, who observed the demeanor of the witnesses, discredited that testimony [given by the special agent]."**

This Court stated in *LaSalle*:

> "We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution."

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* 554 F.2d at 304.

** 554 F.2d at 306.

Without any hearing or discovery, it is simply impossible for a taxpayer to establish, or for a district court to determine, whether such an "institutional commitment" exists notwithstanding a special agent's affidavit to the contrary. Just as the special agent's sworn testimony in *LaSalle* was rejected by the District Court, so too in this case the District Court should have held a hearing in order to determine whether to accept or reject the assertion in the special agent's affidavit, especially in view of the special agent's statement that his "only remaining interest was in his criminal investigation of Roger Keech."

CONCLUSION

For the above reasons, and for the reasons set forth in the petition previously filed in this matter, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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